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No. 84-566

In the Supreme Court of the United States

OCTOBER TERM, 1984

TIMOTHY O'LEARY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that the district court abused its discretion in admitting evidence of other crimes under Fed. R. Evid. 404(b).

1. Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on one count of conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. 846, and acquitted on five substantive counts of possession and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App. 3a-9a).

The evidence at trial showed that petitioner, a Baldwin, Pennsylvania police officer, conspired with co-defendant Darryl Bazner to distribute cocaine from June through September 1983.[1] Petitioner was the source for the drug,

[1]Bazner pleaded guilty to two counts of the indictment and testified for the government at trial.

while Bazner distributed it. Pet. App. 4a-5a. The evidence against petitioner consisted primarily of Bazner's testimony, several recorded telephone conversations between petitioner and Bazner,[2] cash, cocaine and drug paraphernalia discovered at petitioner's home and in his car, and police surveillance of petitioner's house, where Bazner was observed directly before selling cocaine to an undercover agent (*id.* at 5a; Appellee's C.A. Br. App. 8b-9b, 14b-17b). Following the district court's explicit balancing of prejudice and probative value (Pet. App. 8a-9a), Bazner testified at trial that he had over the last year purchased cocaine from petitioner approximately 20 times (*id.* at 6a). The court of appeals upheld the admission of this evidence as within the district court's discretion under Fed. R. Evid. 403 and 404(b),[3] reasoning that it was proper to show Bazner's familiarity with petitioner and their concert of action, and that any possibility of prejudice was diminished by the district court's limiting instructions to the jury (Pet. App. 6a-9a).

2. Petitioner contends (Pet. 16-26) that the district court abused its discretion in admitting evidence of cocaine transactions outside the period of the charged conspiracy

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[2]Petitioner's statements included "I think we all got in over our heads," "they ain't got nothing on me," and "all it is, is my word against yours." Pet. App. 5a; Appellee's C.A. Br. App. 23b-25b, 32b.

[3]Fed. R. Evid. 403 provides in pertinent part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice * * *.

Fed. R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

because there was insufficient proof that he had in fact participated in those transactions.[4] This factbound claim does not merit further review.

Petitioner relies primarily on *United States* v. *Shepherd*, 739 F.2d 510 (10th Cir. 1984), contending (Pet. 18-21) that *Shepherd* prohibits the admission of other crimes evidence based solely on the uncorroborated testimony of an accomplice. This reliance is misplaced. In *Shepherd*, the court was confronted with a situation where "the prosecution depended entirely upon the uncorroborated testimony of an accomplice to prove defendant's involvement in the charged crime and * * * [the government] attempted to utilize the uncorroborated testimony of the same accomplice to show defendant's involvement in prior crimes" (739 F.2d at 513). Here, by contrast, there was considerable evidence in addition to Bazner's testimony connecting petitioner to the charged offense. See page 2 & note 2, *supra*. The *Shepherd* court expressly noted that other crimes evidence is admissible in such circumstances even though it is based solely on an accomplice's testimony (739 F.2d at 513). Moreover, in *Shepherd*, the testimony concerning other crimes consumed approximately one-half the trial, prompting the court to conclude (*id.* at 513-514) that its prejudicial effect outweighed its probative value. In this case, on the other hand, Bazner's brief and conclusory testimony concerning his prior purchases of cocaine from petitioner (see Pet. App. 6a) was in no way the focus of the trial, nor could it have had the prejudicial impact of the lengthy and detailed testimony whose admission constituted reversible error in *Shepherd*.

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[4]Petitioner does not contend that the evidence, if sufficiently trustworthy, was otherwise inadmissible under Rule 404(b).

Petitioner also contends (Pet. 21-26) that Bazner's testimony concerning petitioner's prior cocaine sales should not have been admitted because it was not "clear and convincing." He does not cite a single case, however, that reversed a conviction because evidence admitted under Rule 404(b) failed to meet this standard.[5] Moreover, the dicta in the cases on which petitioner relies do not conflict with the decision below. The court of appeals did not reject the clear and convincing standard; rather, it apparently found it unnecessary to reach the issue on these facts.[6] Finally, even if there were a conflict on the standard of proof, the fleeting reference to unquestionably relevant other crimes here and the necessarily speculative nature of any resulting prejudice hardly call for a resolution of the issue in this case. See generally, *e.g.*, *United States* v. *Bledsoe*, 531 F.2d 888, 891 (8th Cir. 1976) ("[r]eversal [for a violation of Rule 404(b)] is generally commanded only where the questioned evidence has no bearing on any of the issues involved").

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[5]In *United States* v. *Shackleford*, 738 F.2d 776 (7th Cir. 1984), the evidence of other crimes was not admissible for a proper purpose. In *United States* v. *Frederickson*, 601 F.2d 1358 (8th Cir. 1979), the court upheld the admission of other crimes evidence. In *United States* v. *Bronco*, 597 F.2d 1300 (9th Cir. 1979), the court reversed for failure to grant a severance under Fed. R. Crim. P. 14. And in *United States* v. *Shelton*, 628 F.2d 54 (D.C. Cir. 1980), the government did not argue on appeal that the evidence in question was properly admitted, but only that its admission was harmless error.

[6]Uncorroborated other crimes testimony of an accomplice has often been held to meet the clear and convincing standard. See, *e.g.*, *United States* v. *Evans*, 697 F.2d 240, 249 (8th Cir.), cert. denied, 460 U.S. 1086 (1983); *United States* v. *O'Brien*, 618 F.2d 1234, 1239 (7th Cir.), cert. denied, 449 U.S. 858 (1980); *United States* v. *Trevino*, 565 F.2d 1317, 1319 (5th Cir.), cert. denied, 435 U.S. 971 (1978). Because such uncorroborated testimony is sufficient to convict under the reasonable doubt standard, there is no reason why it cannot satisfy the less demanding clear and convincing test. Petitioner does not suggest that Bazner's testimony was inherently incredible.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

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